Supreme Court, U.S.
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Docket No. _____

In the Supreme Court of the United States

JOSE ZOLLINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Petitioner is entitled to relief based on his complaint that his sentence violated his rights under the Sixth Amendment as stated by this Court in Blakely v. Washington, (and later in United States v. Booker) which was raised for the first time on appeal in a Motion for An Issuance of a Certificate Appealability from an order denying his petition filed in the District Court under 28 U.S.C§2255.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appellant: Jose Zollino

Appellee: United States of America

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

The February 14, 2005, Order of the United States Court of Appeals for the Fifth Circuit Denying Motion for Rehearing, which is set out at p.1a of the Appendix to this petition. The January 11, 2005, Order of the United States Court of Appeals for the Fifth Circuit Denying Certificate of Appealability, which is set out at pp.2a-3a of the Appendix to this petition. The August 10, 2004, Order of the United States District Court Denying Request for Certificate of Appealability, which is set out on p.4a of the Appendix to this petition. The March 29, 2004, Order of the United States District Court on Magistrate's Memorandum and Recommendation, which is set out on pp.6a-15a of the Appendix to this petition. The January 22, 2004, United States Magistrate's Memorandum and Recommendation, which is set out on pp.16a-43a of the Appendix to this petition. The Judgment of the United States District Court in a Criminal Case set out on pp.44a of the Appendix to this petition.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The judgment of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed was entered on January 11, 2005;

2. A Motion for Rehearing was filed and an Order Denying the Motion for Rehearing was entered by the United States Court of Appeals for the Fifth Circuit on February 14, 2005.

3. The statutory provision which confers on this court jurisdiction to review on Writ of Certiorari the Judgment or Order in question is 28 U.S.C. §1254.

4. The notification required by Rule 29.4(a) requiring service on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001 has been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional Provision involved in this case is the Sixth Amendment to the United States Constitution which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The statutory provision involved is 28 U.S.C§2253. It is set forth in the appendix.

STATEMENT OF THE CASE

Proceedings in the Courts Below

Petitioner, Jose Zollino, was charged by indictment with criminal offenses arising out of his participation in the

operations of an investment firm in San Antonio, Texas. (Rec. Vol. 2, p.334). He entered a plea of guilty to two counts of the indictment as part of a plea agreement. (Rec. Vol. 2, p.469). Pursuant to the plea agreement, Petitioner was sentenced to a prison term of one hundred forty-four (144) months (Rec. Vol. 2, p.495). The plea agreement included provisions for waiver of appeal (Rec. Vol. 2, p.469). Post-judgment, Petitioner filed a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. §2255 (Rec. Vol. 3, p. 657).

The Motion was referred to the Magistrate who issued a Memorandum and Recommendations on January 22, 2004 (Rec. Vol. 4, p. 27). Mr. Zollino filed Objections to the Magistrate's Memorandum and Recommendations (Rec. Vol. 4, p. 52). The District Court entered its Order Adopting the Magistrate's Memorandum and Recommendations and Denying Motion to Vacate Sentence was signed on March 29, 2004 (Supp. Rec., p. 1). Petitioner gave notice of appeal to this court (Supp. Rec., p. 11). The District Court denied issuance of a certificate of appealability(Supp. Rec., p. 1).

The District Court had jurisdiction of this case pursuant to 28 U.S.C.§§ 2241 and 2255. This case was filed by Petitioner Jose Zollino as a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. §2255 (Rec. Vol. 3, p. 657). Petitioner sought habeas corpus relief from his judgment of conviction and sentence of confinement in Cause No. SA-01-CR-180(1)EP, United States of America v. Jose Zollino, United States District Court for the Western District of Texas. The date judgment was announced in open court was October 9, 2002(Rec. Vol. 10, p. 41). A written judgment was subsequently issued on October 28, 2002(Rec. Vol. 3, p. 495). The Motion for Relief under 28 U.S.C. §2255 was filed on October 8, 2003(Rec. Vol. 3, p. 657). The Motion for Relief was denied by the District Court(Supp. Rec., p.1) and the District Court has refused to issue a Certificate of Appealability(2nd Supp. Rec., p 1).

The United States Court of Appeals for the Fifth Circuit has jurisdiction of this cause pursuant to 28 U.S.C.§2253 entitled "Appeal".

The District Court's Order Adopting the Magistrate's Memorandum and Recommendations and Denying Motion to Vacate Sentence was signed on March 29, 2004 (Supp. Rec., p. 1). Thereafter, Petitioner, Jose Zollino timely gave notice of appeal by mailing the Notice of Appeal by regular, first class mail through legal mail at FCI Forrest City on April 9, 2004. (Supp. Rec., p. 11). On August 16, 2004, the District Court entered its Order Denying Certificate of Appealability in this cause. (2nd Supp. Rec., p. 1).

This appeal is from the final order of the District Court Adopting the Magistrate's Memorandum and Recommendations and Denying Motion to Vacate Sentence and from the final order of the District Court Denying Certificate of Appealability which dispose of all parties and claims.

Entry of Plea

Mr. Zollino entered into a plea agreement with the Government (Rec. Vol 2, p. 469). As part of his agreement, Mr. Zollino agreed to plead guilty to Count I, charging Conspiracy to Commit Fraud, and Count XII, charging Conspiracy to Launder Monetary Instruments, of the superceding indictment (Rec. Vol. 2, p. 469). The remaining counts of the superceding indictment were dismissed pursuant to the agreement (Rec. Vol. 2, p. 334). The plea agreement included a stipulation as to punishment pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. That agreement was that the punishment would be a term of imprisonment of 144 months. That was the only agreement regarding punishment set forth in the plea agreement which was in writing and filed with the Court. The parties did not